

ROUTT COUNTY DEVELOPMENT, LTD.

IBLA 76-792

Decided December 19, 1977

Appeal from a determination by the U.S. Geological Survey that the McKinnon No. 1 Mine be classified as a new operation pursuant to 30 CFR 211.1(d)(1)(iii).

Affirmed.

1. Coal Leases and Permits: Generally--Coal Research and Development--Geological Survey

A mining plan submitted to the U.S. Geological Survey is properly classified a "new operation" as defined by 30 CFR 211.1(d)(1)(iii) where as of the date of its submission to the Department, the Department has not completed its environmental impact analysis involving the area in which the mining plan is located, nor has it, as of that date, commenced and expended substantial resources in the preparation or completion of that analysis.

APPEARANCES: James R. Kruse, Esq., of Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Routt County Development, Ltd., has appealed to this office from a determination by the U.S. Geological Survey that classified the mining plan for the McKinnon No. 1 Mine, Carbon and Energy Counties, Utah (U-0142235, U-0147570, U-020305, U-044076, and U-073120), as a "new operation: as defined in 30 CFR 211.1(d)(a)(iii).

The Department promulgated substantial changes in its coal mining operating regulations May 17, 1976, in 41 F.R. 96, which set forth the discovery, testing, development, mining, preparation, and handling of coal under leases, licenses, and permits issued for federally

owned coal regardless of surface ownership. These new regulations in 30 CFR 211.1 specifically provided, among other things that:

(d) The provisions of this Part shall become effective upon the date of publication in the Federal Register as final rulemaking, except as hereinafter provided:

(1) Existing operations. (i) On and after 180 days from the effective date of this Part, the provisions of I 211.40(a) shall apply to all existing operations with respect to lands from which the overburden has not previously been removed, provided, however, that this para-graph shall not be deemed to apply the requirements of i 211.40(a) (1) and (2) hereof to any operation for which a mining plan has been approved on or before the effective date of this Part and for which a variance pursuant to the provisions of § 211.40(a)(2) would be required.

* * * * *

(iii) For the purpose of this paragraph, the term "existing operations" shall mean:

(A) All operations for which a plan has been approved on or before the effective date of this Part, and

(B) All operations with respect to which a proposed plan has been submitted to the Department on or before the effective date of this Part, and with respect to which proposed plan the Department has on that date either completed its environmental impact analysis and determined that no environmental impact statement under section 102(2)(C) of the National Environmental Policy Act is necessary, or has determined that such a statement is necessary and has commenced, and expended substantial resources of the Department in the preparation or completion, of such a statement.

(iv) On or before August 16, 1976, the Director of the Geological Survey shall review all proposed plans which have been submitted to the Department or on before the effective date of this Part and after consultation with appropriate Federal surface managing agencies, publish in the Federal Register a list which shall identify each such proposed plan and whether it will be considered to cover a new or existing operation.

(2) All operations or proposed operations not included in the definition of "existing operations" in the preceding paragraph shall be considered to be new operations, and shall be subject to the provisions of this Part upon the effective date hereof.

[11 Pursuant to these requirements, the Geological Survey published its "List of Proposed Plans for Exploration and Mining on Federal Lands," August 16, 1976, in 41 F.R. 159, which listed mining plans found to be "existing operations" or those found to be "new operations." Appellant's mining plan for the McKinnon No. 1 Mine was found to be a new operation. The notice emphasized the criteria for this classification stating:

The proposed plans have been classified as new or existing operations in accordance with 30 CFR 211.1(d)(1)(iii)(B) which defines existing operations as operations with respect to which a proposed plan has been submitted to the Department on or before the effective date of the Part, and with respect to which proposed plan the Department has on that date either completed its environmental impact analysis and determination that no environmental impact statement under section 102(2)(c) of the National Environmental Policy Act is necessary, or has determined that such a statement is necessary and has commenced, and expended substantial resources of the Department in the preparation or completion, of such a statement.

Substantial resources of the Department are considered to have been expended in the preparation of an environmental impact statement when the preliminary manuscript of the draft environmental impact statement has been completed and circulated internally for comments.

Appellant now appeals to his Board pointing out that the Geological Survey's determination results in the immediate application to this mine of the coal mining operation regulations without the opportunity for phased adaption of existing operations to the new regulations. Appellant argues, essentially, that the McKinnon Mine is an "existing operation within the regulations set forth in 30 CFR Part 211. It contends that it has done a great deal of preparatory work since 1974 to coordinate its mining operations with developing Interior policies and to maintain compliance with the requirements of the changing proposed regulations prior to the final adopted version of the regulations of 1976. It argues that during this period the development work completed on behalf of the operator

on the property met or exceeded the then proposed regulations and consisted of as much work as was permissible under governmental approvals and accepted development practices.

From our review of the record, and the governing regulations, we cannot find that appellant has shown that it comes within the regulatory definition of an "existing operation." Appellant exhaustively sets forth the preparatory work done on the McKinnon Mine which, in its own view, amounts to an existing operation. It also claims the mining and reclamation plan for the mine met or exceeded all previous proposed regulatory requirements and considers such voluntary compliance significant. By applying its own test for what it considers an existing operation, appellant is seeking a determination of substantial compliance with the regulation. However, it completely overlooks the crux of what is actually required by the current regulation, *i.e.*, whether (1) the Department has completed its environmental 'impact analysis and determined no environmental impact statement under section 102(c) of the National Environmental Policy Act is necessary or (2) it has determined that such a statement is necessary and has begun an environmental impact statement and expended substantial resources of the Department in the preparation or completion of that statement. These requirements have not been met for the crucial area including the McKinnon No. 1 Mine.

Appellant does not deny that its mining plan for the McKinnon No. 1 Mine falls within the Department's Central Utah Environmental Impact Statement area which was not completed at the time of the, publication of the regulation and, in fact, is still being prepared. Thus it does not satisfy the first alternative. Nor does appellant contend that, as of that date, the Department had expended substantial resources toward completion of the statement, Thus it does not satisfy the second alternative. Even if appellant did make a good faith attempt to comply with earlier regulatory proposals, that in and of itself would not relieve it of meeting the standards for an existing operation" as set forth in the actual regulations as adopted by the Department.

Therefore, appellant's contention that the McKinnon No. 1 Mine be termed an "existing operation" is without merit. Since appellant's position has been fully argued in its brief, we do not believe an oral argument would be helpful and its request for one is denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Martin Ritvo
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Edward W. Stuebing
Administrative Judge

